

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DELROY ESPINOZA,

Plaintiff,

v.

JENNY WONG,

Defendant.

Case No. [24-cv-06427-JST](#)

**ORDER OF DISMISSAL WITH LEAVE
TO AMEND; DENYING AS MOOT
REQUEST TO FILE COMPLAINT BY
MAIL**

Re: ECF No. 8

Plaintiff, an inmate at Pelican Bay State Prison (“PBSP”), has filed a *pro se* action pursuant to 42 U.S.C. § 1983 against PBSP doctor Jenny Hwang. Now before the Court for review pursuant to 28 U.S.C. § 1915A is Plaintiff’s complaint, ECF No. 9; and Plaintiff’s request to file his complaint by mail, ECF No. 8. Plaintiff has been granted leave to proceed *in forma pauperis* in a separate order.

DISCUSSION

A. Standard of Review

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. *See* 28 U.S.C. § 1915A(b)(1), (2). *Pro se* pleadings must, however, be liberally construed. *See United States v. Qazi*, 975 F.3d 989, 993 (9th Cir. 2020).

Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). “Specific facts are not

necessary; the statement need only “‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citations omitted). While Rule 8 does not require detailed factual allegations, it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009). A pleading that offers only labels and conclusions, or a formulaic recitation of the elements of a cause of action, or naked assertions devoid of further factual enhancement does not suffice. *Id.* To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988).

B. Complaint

The complaint sues Pelican Bay State Prison doctor Jenny Hwang, alleging that she provided inadequate medical care. ECF No. 9 at 2-3. The complaint states that Plaintiff was seen by defendant Hwang via Zoom on July 11, 2024. *Id.* Plaintiff feels that defendant Hwang “categorized [him] with discriminatory remarks” and demonstrated prejudice against him. *Id.* Defendant Hwang “seem[ed] to be very derogatory” when Plaintiff expressed concern regarding his weight and lack of energy, and also insinuated that Plaintiff smokes, even though he told her that he “never smoked a day in [his] life.” *Id.* Although Plaintiff had subsequent medical appointments on August 1, August 8, and August 27, his issues have not been addressed, and it feels like Plaintiff’s treatment and “future plans” are “being delayed.” *Id.* Plaintiff believes that the failure to address his issues are likely due to defendant Hwang’s negligence or “whatever notes she applied to [his] records.” *Id.* Plaintiff requests the following relief: that his primary care be handled by a different doctor than defendant Hwang, and that he receive “declaratory damages,” “injunctive damages,” attorney’s fees, and over \$25,000 in compensatory damages. *Id.*

C. Dismissal with Leave to Amend

The Court DISMISSES the complaint with leave to amend because Plaintiff has not alleged any violation of federal law or the federal Constitution, as required for federal question jurisdiction and to state a claim under 42 U.S.C. § 1983.

1 It appears that Plaintiff may be attempting to either (1) state an Eighth Amendment claim
2 for deliberate indifference to his serious medical needs, or (2) seek relief for defendant Hwang's
3 allegedly discriminatory or derogatory comments.

4 The Eighth Amendment prohibits correctional officials from being deliberately indifferent
5 to prisoner's serious medical needs. *See Estelle v. Gamble*, 429 U.S. 97, 104 (1976). A
6 determination of "deliberate indifference" involves an examination of two elements: the
7 seriousness of the prisoner's medical need and the nature of the defendant's response to that need.
8 *See McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *overruled in part on other grounds*
9 *by WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc). A "serious"
10 medical need exists if the failure to treat a prisoner's condition could result in further significant
11 injury or the "unnecessary and wanton infliction of pain." *McGuckin*, 974 F.2d at 1059 (citing
12 *Estelle*, 429 U.S. at 104). A prison official is deliberately indifferent if he knows that a prisoner
13 faces a substantial risk of serious harm and disregards that risk by failing to take reasonable steps
14 to abate it. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). "A difference of opinion between a
15 prisoner-patient and prison medical authorities regarding treatment does not give rise to a § 1983
16 claim." *Franklin v. Oregon*, 662 F.2d 1337, 1344 (9th Cir. 1981). Similarly, a showing of
17 nothing more than a difference of medical opinion as to the need to pursue one course of treatment
18 over another is insufficient, as a matter of law, to establish deliberate indifference. *See Toguchi v.*
19 *Chung*, 391 F.3d 1051, 1058-60 (9th Cir. 2004). A claim of medical malpractice or negligence is
20 insufficient to make out a violation of the Eighth Amendment. *Id.* at 1060-61.

21 The complaint fails to state an Eighth Amendment claim against defendant Hwang for the
22 following reasons. First, it is unclear what Plaintiff's medical need is, and how it constitutes a
23 serious medical need within the meaning of the Eighth Amendment. Plaintiff states that he is
24 concerned about his weight and energy, but those statements are insufficient to establish a medical
25 need. Second, it is unclear what medical treatment is needed to resolve Plaintiff's concerns.
26 Third, it is unclear who denied, or is refusing to provide, the needed medical treatment. Fourth, it
27 is unclear how defendant Hwang's notes relate to the alleged denial of treatment.

28 The complaint's allegation that defendant Hwang made discriminatory and derogatory

remarks to Plaintiff also fails to state a claim for relief. Allegations of verbal harassment and abuse fail to state a cognizable claim under 42 U.S.C. § 1983. *See Freeman v. Arpaio*, 125 F.3d 732, 738 (9th Cir. 1997) *overruled in part on other grounds by Shakur v. Schriro*, 514 F.3d 878, 884-85 (9th Cir. 2008). This is so even if the verbal harassment is racially motivated. *See Hoptowit v. Ray*, 682 F.2d 1237, 1252 (9th Cir. 1982) *overruled on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995) (federal court cannot order guards to refrain from using racial slurs to harass prisoners). On the other hand, harassment coupled with conduct implicating the Eighth Amendment's proscription against cruel and unusual punishment can sometimes constitute a cognizable claim under § 1983. *See, e.g., Franklin v. Oregon*, 662 F.2d 1337, 1344-45 (9th Cir. 1981) (harassment with regards to medical problems cognizable if it constitutes deliberate indifference). For verbal harassment to implicate the Eighth Amendment's prohibition against deliberate indifference to an inmate's serious medical needs, however, there must be a substantial connection between the harassment and the deliberate indifference to an inmate's serious medical needs. *Id.*

Because it appears that Plaintiff could correct the above deficiencies, the Court DISMISSES the complaint with leave to amend. *See Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) ("a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts") (citation and internal quotation marks omitted).

CONCLUSION

For the foregoing reasons, the Court ORDERS as follows.

1. The Court DENIES as moot Plaintiff's request to file his complaint by mail. ECF No. 8. Plaintiff filed his complaint by electronic mail as required by N.D. Cal. General Order 76. *See* ECF No. 9.

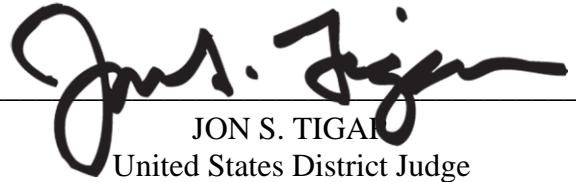
2. The Court DISMISSES the complaint with leave to amend. Within twenty-eight (28) days of the date of this order, Plaintiff shall file an amended complaint that addresses the identified deficiencies. The amended complaint must include the caption and civil case number used in this order, Case No. 24-cv-06427 JST (PR) and the words "AMENDED COMPLAINT"

1 on the first page. If using the court form complaint, Plaintiff must answer all the questions on the
2 form in order for the action to proceed. An amended complaint completely replaces the previous
3 complaints. *See Lacey v. Maricopa Cty.*, 693 F.3d 896, 925 (9th Cir. 2010). Accordingly,
4 Plaintiff must include in his amended complaint all the claims he wishes to present and all of the
5 defendants he wishes to sue, and may not incorporate material from the prior complaint by
6 reference. Failure to file an amended complaint in accordance with this order in the time provided
7 will result in dismissal of this action without further notice to Plaintiff. The Clerk shall include
8 two copies of the court's complaint form with a copy of this order to Plaintiff.

9 This order terminates ECF No. 8.

10 **IT IS SO ORDERED.**

11 Dated: March 5, 2025

12 
13 JON S. TIGAI
14 United States District Judge